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TABLE OF AUTHORITIES.

CASES:

IN THE

Supreme Court of the United States

October Term, A. D. 1947.

No. 492

NAHUM BIRNBAUM, M. J. LUTTERMAN, co-partners, comprising a partnership under the name and style Birnbaum & Co., BIRNBAUM AND CO., a co-partnership, consisting of Nahum Birnbaum and M. J. Lutterman, JAMES A. COLE, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc.,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The order of September 30, 1947 dismissing the appeals was not reported. There was no opinion. There are other decisions in this same cause, however, which should be called to the attention of this Court. They are:

The opinion of the Circuit Court of Appeals affirming the orders approving and confirming the plan of reorganization. 160 F. (2d) 59 (January 4, 1947).

This Court's denial of certiorari to review affirmance of the orders of approval and confirmation. 331 U. S. 808 (April 14, 1947).

Dismissal by the Circuit Court of Appeals of present petitioners appeals from the order of sale (April 21, 1947), not reported.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered September 30, 1947. The petition for writ of certiorari was filed December 29, 1947. The jurisdiction of this Court is invoked by petitioners under Section 240 (a) of the Judicial Code (28 U. S. C. Sec. 347 (a)).

STATUTE INVOLVED.

The statute involved is Chapter X of The Bankruptcy Act (II U. S. C. Secs. 501 *et seq.*).

QUESTIONS PRESENTED.

The questions presented are:

1.

Is an order dismissing a petition to modify an order of sale an appealable order when such petition was filed approximately six months after the entry of the order of sale and when an earlier appeal from the same order of sale had been dismissed and review by certiorari was not attempted?

2.

Is an order of the District Court dismissing a petition to modify an order of sale an appealable order when the order of sale merely had the effect of carrying out a decision of the Circuit Court of Appeals and when the identical points presented by the petition to modify had been

decided adversely to petitioner by that decision of the Circuit Court of Appeals?

3.

Did junior bondholders, who were excluded from any equity in the debtor on their appeals from the approval and confirmation of the plan, have any right to seek modification of the subsequent order of sale which was a necessary step in the execution and carrying out of the plan?

4.

Where appeals which would have upset, or at least indefinitely postponed, the consummation of the plan of reorganization were filed the afternoon of the day before the date set for consummation of the plan, did the Court of Appeals move too hastily in acting on a motion to dismiss within twenty-four hours in order to make possible the consummation of the plan?

5.

Did the court in summarily dismissing appeals from nonreviewable orders, by persons who had no equity in the proceeding and no right to appeal, so far depart from the usual course of judicial proceedings as to call for an exercise of this court's power of supervision?

6.

Did the Circuit Court of Apeals have a sufficient record, together with the matters subject to judicial notice, to enable that court to act on the motion to dismiss?

7.

May the City of Chicago and Chicago Transit Authority, both public municipal corporations, be harassed by permitting suits against them for over 100 million dollars under the 1907 ordinance, when both have done nothing

more than fully to comply with the orders of the District Court, which orders have been affirmed by the Circuit Court of Appeals, with certiorari denied by this court, and when the order of sale has been previously appealed and the appeal dismissed, and when the same points now urged were fully argued and adjudicated in such prior appeals, and further when in reliance upon such prior judicial proceedings the Authority has paid over 75 million dollars for Chicago Surface Lines property, being the value fixed therefor in such proceedings, and when the public on the faith of those proceedings has invested that amount?

STATEMENT OF CASE.

Petitioners' statement of the case wholly fails to present the true picture as it existed at the time they filed their notices of appeal.

September 29, 1947, which they dismiss as just another day in the week, was actually the day before the date set for the long delayed consummation of the reorganization plan of Chicago Surface Lines. On September 30th, Chicago Transit Authority was to turn over the 75 million dollar purchase price, accept the deeds, and start operating the street car lines in Chicago (R. 55, 56).

Petitioners themselves had created the situation of which they now complain by filing their appeals a few hours before the time set for closing this very large transaction.

Another fact not clearly brought out is that petitioners' contentions, if successful, would require the Transit Authority to pay for the properties not $75,000,000 called for by the plan (Chicago Railways' share being $44,475,000) but some $172,000,000 (of which Chicago Railways' share would be some $101,000,000) (160 F. (2d) 59, 66).

Petitioners have tried to portray themselves as summarily deprived of rights, with no opportunity for hearing. Not only had they asserted these same rights on two prior unsuccessful appeals and in an unsuccessful petition for certiorari, but they had, in one of those appeals, approximately six months before, attacked on identical grounds the same order of sale here involved. After that last mentioned appeal was dismissed they filed no petition for certiorari.

This is the background against which petitioners filed their notices of appeal on September 29, 1947.
29, 1947.

Petitioners' position is placed in its true perspective by the following development of the facts:

This case arises out of the reorganization, under chapter X, of the corporations comprising Chicago Surface Lines. The plan of reorganization filed by the City of Chicago, and later adopted by both Chicago Transit Authority, a municipal corporation created for the purpose of acquiring and operating the major mass transportation systems in the metropolitan area of Chicago, and the five bondholders committees representing security holders, was approved and confirmed by the District Court. That plan was the sixth major attempt at reorganization, the other five having failed.

From the orders of approval and confirmation petitioners and others took appeals to the Circuit Court of Appeals, 7th Circuit, which on January 4, 1947, rendered its opinion and judgment affirming the orders.

Both in the District Court and in the briefs in the Circuit Court of Appeals petitioners had urged their rights under the 1907 ordinance in much the same terms as they are now presented in the petition. It was the theory of

respondents and other proponents of the plan that if the 1907 ordinance (which by its terms expired in 1927) retained any vitality and if there were any "rights" under it, those rights belonged to the debtor corporation, the Chicago Railways Company. The plan of reorganization provided for the acquisition by the purchaser, Chicago Transit Authority, or a higher bidder, of all property and property rights of the debtor (except certain retained assets—and no rights under the ordinance were retained). Consequently, if there were any rights remaining under that ordinance, they passed to the purchaser together with the more tangible assets. Moreover, the plan provided for a release of claims against the City of Chicago under any ordinance or otherwise, in consideration of the release by the city of certain claims against the trustees.

The Circuit Court of Appeals in its opinion (*In re* Chicago Railways Company, 160 F. (2d) 59, 66) overruled the position of the petitioners and sustained that of respondents in these words:

> "They [petitioners] argue that the City of Chicago induced investments of capital in the companies, now represented by the outstanding securities. They insist that the ordinance embodies covenants whereby the City reserved the right to purchase the properties and that the City agreed that if the City or its licensee did not purchase the properties on or before February 1, 1927, and if the City should thereafter grant a new ordinance to a licensee, then such licensee should be obligated to pay for the properties, a price computed under the terms of the 1907 ordinance; that the City has granted Transit Authority a new ordinance and is a licensee of the City and is obligated to pay the purchase price provided for by the ordinance. In other words, that the ordinance constituted a binding contract on the part of the City or its licensee to buy the properties at the price of $172,000,000, and *Harris Trust & Savings Bank* v. *Chicago Rys. Co.,* D. C., 39

F. 2d 958, and *Superior Water, Light & Power Co.* v. *City of Superior,* 263 U. S. 125, 44 S. Ct. 82, 68 L. Ed. 204, among other cases are cited. The *Harris Trust* case did not involve the question of whether the City had entered into a contract to buy. In that case the plaintiff sought a decree to direct the receivers to cease paying compensation to the City, and that money in certain funds be paid on the first mortgage bonds. In the *Superior Water* case, the City agreed to purchase. It had entered into a valid contract to buy the water plant. In our case § 20 of the ordinance merely provided that the City reserved to itself the right to purchase, while §§ 21 and 22 made it clear that the City had the right or option, not the obligation, to buy, hence the cases cited are inapplicable. True, § 23 does provide that if, after the expiration of the ordinance, the City should grant a franchise to a new company, the new company shall buy the property upon the terms upon which the City might have purchased. Even so, that fact, under the circumstances in this case, is no reason why the plan should not be approved, since all contingent rights of a debtor pass to its trustee and become part of its estate, *Pollack* v. *Meyer Bros. Drug Co.,* 8 Cir., 233 F. 861, and may be dealt with in Chapter X proceedings."

The quoted words disclose the close similarity of the position taken by petitioners on that appeal to the position now taken by them, and that the argument of respondents was sustained.

After that judgment had been rendered by the Circuit Court of Appeals, the lower court waited two months before entering any further orders. Then, no petition for certiorari having been filed and the mandate not having been stayed, the District Court on March 7, 1947, entered the order of sale which was necessary to carry the plan into execution. The plan contemplated the purchase of the properties by the newly created municipal corporation, Chicago Transit Authority, and that the latter would sell

its revenue bonds (it having no powers of taxation) at the time of and for the purpose of acquiring the properties.

On April 3, 1947, the last day but one allowed by the statute, the present petitioners and others filed their petition for certiorari in this court, seeking to review the aforesaid judgment of January 4, 1947.

On April 4, 1947, petitioners (but not the others) also filed appeals from the order of sale entered March 7, 1947.

The order of sale had set April 22, 1947, as the date of sale. On or before March 22nd, publication had been begun for said sale both in Chicago and New York. These and other surrounding facts are shown by the motion of respondents filed in this Court April 11, 1947, asking that disposition of that petition for certiorari be advanced on account of the public interest (*In re* Chicago Railways Company, etc., Nos. 1200 to 1205), to which reference is made for a more complete statement of the public interest involved in these proceedings.

That motion to advance was presented to this Court April 11th, was allowed April 14th, and the petition for certiorari was denied on the latter date.

Among the principal reasons then relied on by the petition for certiorari are the same grounds now being urged again by petitioners. This will appear by reference to this court's files in the matter of Chicago Railways Company Nos. 1200 to 1205, October term 1946.

After the petition for certiorari had been denied by this court, these respondents on April 16, 1947 presented an emergency motion to the Circuit Court of Appeals showing that the sale was set for April 22nd and that the pendency of the appeals from the order of sale would make necessary a postponement of the sale and a deferment of the

offering of the Transit Authority's bonds. The motion was taken as an emergency motion, and on April 21, 1947, the appeals from the order of sale were dismissed.

Thereafter the sale proceeded; Chicago Transit Authority became the purchaser subject to its ability to market its revenue bonds. Because of the unwillingness of counsel for the bond-buying syndicate to give an opinion approving the bonds while the period for filing a petition for certiorari from the order of April 21, 1947, had not expired, the Authority was forced to defer its offering of bonds until early August of 1947. Then, no petition for certiorari having been filed, the bonds were published for sale. In the meantime, on May 3, 1947, the sale to the Authority had been confirmed by the District Court. From that order no appeal has ever been taken.

Late in August the bonds of the Authority were fully subscribed by the public.

Within a few days thereafter, namely, on September 3, 1947, petitioners filed their petitions, involved in this proceeding, seeking to modify the injunctional provisions of the order of sale entered on March 7, 1947, (R. 2, 19) from which, as above noted, they had previously taken appeals which had been dismissed by the Circuit Court of Appeals.

On September 12th their petitions came on for hearing before the District Court and were disallowed and dismissed (R. 42-44).

The Authority having received commitments for its bonds, it agreed with the Trustees that the sale and delivery of its bonds, the receiving of the money for them, the transfer of the property, and the payment of the purchase price should be made on the last day of the month to simplify bookkeeping problems. The last day of September, 1947, at eleven o'clock A. M., was fixed for the closing.

On the afternoon of September 29, 1947 at approximately two o'clock, petitioners filed their appeals from the orders of September 12th. Those are the appeals here involved.

Respondents, having anticipated the possibility of such last moment appeals, had prepared an emergency motion (R. 54)to docket and dismiss, with suggestions in support thereof, and had also caused the clerk of the District Court to prepare a short record to which was then added a copy of the notices of appeal. Petitioners' attorneys were served with notice to appear before the Circuit Court of Appeals, together with a copy of a motion to dismiss, and the suggestions. This notice was served at 3:15 P.M., and called for their appearance at 4:00 P.M., September 29. They did appear. The court set the matter for argument at 9:30 the next morning, September 30.

In the emergency motion to docket and dismiss, respondents directed the court's attention to the long history of Chicago traction, to the prior failures of reorganization, to the previous decision of that court dealing with the very same matters raised by the petition to amend the order of sale, to the fact that the plan could be consummated only by the sale of the Authority's revenue bonds; showed that the money to purchase the bonds was then in Chicago awaiting the opinion of bond purchasers' counsel, and that the favorable opinion of counsel was contingent upon clearing away all legal obstacles that might threaten the plan or the security behind the bonds; that the closing had been set for eleven o'clock A.M. on September 30; that the appeals were obviously a final desperate effort to thwart the carrying out of the plan; and presented the legal propositions: (a) that under a long line of decisions in this court and in the Circuit Courts of Appeals an order is not appealable which denies a motion or petition, filed after

the expiration of the appeal period, to modify, alter, rehear or set aside a prior order; (b) that the very position taken by petitioners in their petition to modify, namely, that they had separate rights against the City of Chicago and the Authority, had been urged in the appeals from the orders of approval and confirmation; and that said contention had been denied; and (c) that petitioners had been held to have no equity, and having no equity, had no further appealable interest.

The Circuit Court of Appeals gave petitioners' counsel all the time requested by him for the presentation of his position. The matter was also argued by counsel for the Authority. At the conclusion of the arguments the motion to dismiss was allowed (R. 78).

SUMMARY OF ARGUMENT.

1. a. The orders of September 12, 1947 were not appealable for the reason that they dismissed petitions to modify the order of sale which had been entered almost six months before. An unbroken line of authority holds such an order to be non-appealable.

b. The petitioners have no appealable interest. In the decision affirming the approval and confirmation of the plan of reorganization, the Circuit Court of Appeals held these petitioners had no equity in the debtor and were not entitled to participate in the plan. Thereafter petitioners had no appealable interest in orders entered for the purpose of executing the plan.

c. Petitioners' contentions relating to the 1907 ordinance and to the injunction in the order of sale had been decided adversely to them in prior appeals in this same cause. This required the dismissal of the instant appeals.

2. The short record before the Circuit Court of Appeals was in conformity with Federal Rule 75 (j). The short record as filed, together with that court's knowledge of its own prior decisions in this cause, were adequate to show (a) that the orders were not appealable because they merely dismissed petitions to modify an order entered almost six months before; (b) that petitioners had no appealable interest; and (c) that the issue presented by the appeals had been argued and repeatedly adjudicated.

3. The court was justified in acting promptly to dismiss these appeals as they were filed on the afternoon before the day set for the closing of the transactions wherein the Authority was to sell its bonds, obtain the proceeds there-

from and purchase the plan properties. The appeals were calculated to upset, or at least indefinitely postpone, consummation of the plan; and their dismissal was required to protect the power of the federal courts to carry to conclusion a plan of reorganization. The petitioners were on that day as in all previous hearings accorded due process of law.

4. Petitioners' alleged "special and important reasons" for certiorari are based upon a misconstruction of the authorities cited and a complete misconception of the reorganization proceedings.

5. The people residing in the metropolitan area of Chicago, acting through Chicago Transit Authority, have acquired the transportation lines in reliance upon the orders and decisions of the federal courts. The Authority, and the City, should not be harassed by nuisance suits which seek to relitigate issues that have been argued and disposed of repeatedly in the course of the reorganization proceedings.

ARGUMENT.

I.

THE COURT BELOW DID NOT ERR IN DISMISSING APPEALS FROM NON-REVIEWABLE ORDERS BY PETITIONERS WHO HAD NO EQUITY IN THE DEBTORS AND WHO ASSERTED CONTENTIONS WHICH HAD BEEN DECIDED ADVERSELY TO THEM ON THEIR PRIOR APPEALS IN THIS SAME CAUSE.

There were three sound reasons for dismissing the appeals, and each reason alone was sufficient to justify the action of the Circuit Court of Appeals.

A.

Petitioners' Application to Modify the Order of Sale Was a Matter for the Bankruptcy Court's Discretion. A Denial of Their Application Is Not Reviewable.

Petitioners had no right to appeal, since their petitions to modify the order of sale were in the nature of petitions for a rehearing or modification, and denial was discretionary and non-reviewable.

Petitioners' applications of September 3, 1947 before the bankruptcy court were entitled "Petition To Modify Injunctive Provisions Contained In Order of Sale Entered March 7, 1947." Indisputably those applications were in the nature of petitions for rehearing since they showed on their face that they sought to modify an order which had been entered six months before. The bankruptcy court,

in its discretion, denied the petitions and its action was not appealable.

> *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137, 81 L. Ed. 557, 561.
>
> *Steines* v. *Franklin County,* 14 Wall. 15, 20 L. Ed. 846.
>
> *French* v. *Jeffries,* (CCA 7, 1947) 161 F. (2d) 97.
>
> See also: *Pfister* v. *Finance Corp.,* 317 U. S. 144, 149.

This Court in the *Wayne Gas Case* (300 U.S. 131, 137) stated that, while a court of bankruptcy may grant a rehearing and vacate, alter, or amend its decree after the time for appeal has expired, nevertheless:

> "The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal."

The Circuit Courts of Appeals have followed that rule in bankruptcy cases and applied it to petitions to modify similar to the one here involved.

Old Colony Trust Co. v. *Kurm,* (CCA 8, 1943) 138 F. (2d) 394, 395. Petition to modify order directing debtor's trustees to pay interest and principal on bonds to Old Colony (the bond mortgage trustee) by changing the interest rate from 5% to 6%. Petition denied, and appeal therefrom dismissed on ground the denial was not an appealable order. Citing the *Wayne Gas* (300 U.S. 131) and *Pfister* (317 U.S. 144) cases, among others, the court explained its holding as follows:

> "A motion to modify a judgment falls into the same category as a motion to vacate or for a rehearing. That this court is without jurisdiction of an appeal from an order dismissing a motion to modify a judgment is too well settled to require discussion."

Orton v. *Group of Investors,* (CCA 7, 1946) 155 F. (2d) 489, certiorari denied 329 U.S. 734, 91 L. Ed. 44, is remarkably similar to the case at bar in that the reorganization plan there had been approved below and upheld on appeal. Petitioners there, who, like petitioners here, had been eliminated from the reorganization, sought to modify the order of consummation to allow for possible congressional legislation. The motion was denied and the upper court held the order was not appealable citing the *Wayne Case* (300 U.S. 131) and *Old Colony* (138 F. (2d) 394) cases.

Brown v. *Thompson,* (CCA 8, 1945) 150 F. (2d) 171, 172. A petition was filed seeking reimbursement from the debtor's estate for attorney's fees. The petition was denied. Appellant, several months later, filed petitions for reconsideration, which were denied. He appealed and the court held:

> "The orders of July 24, 1943, and of September 28, 1944, being nothing more than denials of petitions for the rehearing or reconsideration of the order of June 30, 1942, were not appealable."

The grounds in the case at bar were far stronger reasons for dismissing the appeals than in the three cases cited last above, because in those cases the "main" order had not previously been appealed, the only appeal being from a denial of a petition to modify or reconsider the main order. But here the main order—the order of sale—had been appealed by these same petitioners (April, 1947) who objected to the same injunctive provisions which they here seek to modify. Their appeals were dismissed (April 21, 1947) and they did not petition for certiorari.

Petitioners argue that the orders in question are appealable under Section 129 of the Judicial Code (28 U.S.C. 227) and cite cases supposedly supporting that theory (Pet. Br. pp 48-49). The purpose of Section 129 was to make

injunctional orders appealable despite the fact that they were not final but interlocutory. That section is not applicable because our objection to the appeals was not based on the interlocutory nature of the orders appealed from but on the ground that the orders were discretionary.

Three of the four cases cited by them are not in point because no question of rehearing was involved. The fourth, the *American Grain* case, 202 F. 202 (Pet. Br. p. 49) involved a question of rehearing on a patent infringement injunction, but is not in point because there was a showing of a new state of facts. That it is not pertinent is made clear by four other cases in which appeals from petitions to rehear or modify injunctional orders were dismissed (two of the cases distinguishing the American Grain case).

> *Marine Midland Trust Co.* v. *Eybro Corp.* (CCA 2, 1932) 58 F. (2d) 165.
>
> *Cuno Engineering Corp.* v. *Hudson Auto Supply Co.* (CCA 2, 1931) 49 F. (2d) 654.
>
> *Magnetic Mfg. Co.* v. *Dings Magnetic Separator Co.*, (CCA 7, 1930) 37 F. (2d) 709.
>
> *Baker* v. *Baker,* (CCA 4, 1897), 83 F. 3.

The following statement of the court in the *Marine Midland* case above (58 F (2d) 165, 167) shows the weakness of petitioners' argument:

> "Inasmuch as the order of April 14, 1931 which granted an injunction in the ancillary suit, was made after a hearing, an appeal from Judge Mack's order of February 4, 1932, denying a motion to vacate it, would only lie in case his order was made, not after what was equivalent to a mere rehearing of the former motion, but upon a new state of facts. This is the effect of our recent decision in *Cuno Engineering Corp* v. *Hudson Auto Supply Co.*, 49 F. (2d) 654. We followed *Baker* v. *Walter Baker & Co.* (C.C.A.) 83 F. 3, and distinguished *American Grain, etc., Co.* v. *Twin City, etc., Co.* (C.C.A.) 202 F. 202.

Furthermore, the order of sale with its injunctive provisions was a necessary step in the execution of the plan pursuant to the mandate of the Circuit Court of Appeals in its judgment affirming the approval and confirmation of the plan. Since that order was in compliance with the mandate, a petition to modify it would not be appealable.

Kresge v. *Winget Kickernick Co.* (C.C.A. 8, 1939) 102 F. (2d) 740.

The above authorities demonstrate that the denial of a petition (especially when filed after the appeal period) to rehear or modify an order, is not appealable; and that the same rule applies to an injunctional order.

We submit that this point alone, which was clearly presented by the short record, fully sustains the action taken by the Circuit Court of Appeals.

B.

Petitioners, on the Appeal From Approval and Confirmation of the Plan, Were Held to Have No Equity in the Debtor. They Therefore Had No Further Appealable Interest in the Proceedings and Had No Right to Maintain the Instant Appeals in the Court Below.

Petitioners are certain B Bondholders of Chicago Railways Company, one of the debtors in the bankruptcy proceedings. They and others had appealed from the bankruptcy court's orders approving and confirming a plan which had excluded them from participation, as required by the absolute priority rule. The Circuit Court of Appeals held that the B bondholders had no equity in the debtors and were not entitled to participate in the plan. *In re Chicago Rys. Co.* (CCA 7, 1947) 160 F. (2d) 59, 67. (Cert. den. 331 U.S. 808). After certiorari was denied by

this Court, petitioners had no further appealable interest as B bondholders in the plan proceedings. The reason for holding that persons in the position of the B bondholders do not have an appealable interest is well stated in *In re Michigan-Ohio Bldg. Corp.* (CCA 7, 1941) 117 F. (2d) 191, 193, where an appeal was dismissed on the Court's own motion, the Court saying:

> "Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed. * * * It follows that if his interest or right in and to the subject matter ceases pendente lite, by conveyances, assignment or otherwise, his appealable interest thereby expires * * *."

Since petitioners were held to have no equity in the debtor, the subsequent order of sale relating to the debtor could not have affected them; their property and rights in the debtor were non-existent so long as the plan stood approved and confirmed.

That bondholders or stockholders who have been eliminated from reorganization by valuation of property have no further interest in the debtor's reorganization is shown by *R. F. C.* v. *Denver and Rio Grande Western Railroad Co.*, 328 U. S. 495, 520, 90 L. Ed. 1400, 1416, the Court holding that:

> "It would also follow that the objection of a stockholder, the Missouri Pacific Railroad Company, through its Trustee in reorganization, to a voting trust for future control of the debtor would be ineffective because this stockholder is eliminated from the reorganization by the valuation of the property and allocation of securities."

Petitioners are in a position similar to the stockholder railroad in the above case. They no longer have any ap-

pealable interest in the plan proceedings and cannot object to orders entered in furtherance of the execution and consummation of the plan after its approval and confirmation have been affirmed on appeal.

C.

Petitioners' Contentions Relating to the 1907 Ordinance and to the Injunction in the Order of Sale Were Decided Adversely to Them in Prior Appeals in this Same Cause.

No matter how piously petitioners proclaim that their contentions relating to the 1907 ordinances, if sustained, would not interfere with the Reorganization Plan and have not been passed on before, they cannot disguise either the effect on the Plan or the fact that their claims have been passed on and rejected twice previously by the Circuit Court of Appeals and were urged once before in this Court without success.

Their contentions if sustained would not only affect the approved and confirmed (and consummated) Plan but would disrupt it completely. Instead of the 75 million dollar fair upset price called for by the plan and paid by Chicago Transit Authority on September 30, 1947, petitioners would, if successful, require the City of Chicago or the Transit Authority (in either case, the public) to pay a price of some 172 million dollars for the Surface Lines properties. **Obviously the Circuit Court of Appeals could not have affirmed the approval and confirmation of the plan calling for a purchase price of 75 million dollars without necessarily holding that neither petitioners nor any one else had a right to insist on a purchase price of 172 million dollars.**

The first time petitioners urged these alleged rights be-

fore the Circuit Court of Appeals that court recognized their contentions but ruled against them (160 F. 2d 59, 66), using the words quoted in the statement of facts.

The Circuit Court of Appeals held that whatever the validity of the rights, they belonged to the debtor, passed to the trustee, and could be dealt with by the Plan. And they upheld the Plan which under Article II, G released all claims arising from those alleged rights. This was recognized by petitioners in their petition for certiorari before this Court last April (1947): (Nos. 1200 to 1205)

> "On the contrary, the District Court and the Circuit Court approved the plan which requires under Section G that all rights under the ordinances be released by the trustees to the City of Chicago." (Pet. p. 50)

Petitioners again urged the 1907 ordinance in their unsuccessful appeals from the order of sale. They filed a document listing their objections to a motion to dismiss in which they said:

> "Appellants have always claimed, and claim now, that they have a direct and immediate contractual right, independent of any right of the debtors, against the City and the Transit Authority under the 1907 Traction Ordinances." (Page 5)
>
> "Appellants have always asserted that this obligation was neither an asset or a liability of the debtor but was an *in personam* right of the appellants (and other Series B bondholders) against the City and the Transit Authority." (Page 6)

In advancing the same arguments before this court in their petition for certiorari of April, 1947, they devoted a major part of both their brief and their reply brief to the 1907 ordinance. It is not necessary to set out their contentions in detail since they are clearly apparent in those documents—in their two statements of the case (beginning on pages 3 and 27, respectively), in the "Questions Pre-

sented" (Brief page 18), in the "Reasons Relied on for Allowance of the Writ" (Brief pages 19 and 20), and under points I and II of the "Argument" (Brief pages 41 and 51).

Not only have they advanced their 1907 ordinance arguments many times before, but in appealing from the order of sale, they attacked the same injunctive provision which they now wish to modify. Among their suggestions in opposition (filed April 1947 in the Circuit Court of Appeals) to the motion to dismiss their appeals from the order of sale was the following:

> "Appellants seek an elimination of that provision of the Order of Sale which restrains them from asserting in the state courts, or other proper forum, rights against the Transit Authority, the City, or other persons, those rights never having been adjudicated. And appellants seek modification of the order appealed from so that it should provide that the release of the Consolidated Mortgage and the release or conveyance of rights under the 1907 ordinance shall provide that such releases shall be without prejudice to appellants' claims and rights in the premises." (Pages 10 and 11)

Petitioners apparently seek to go on forever proclaiming their rights under the 1907 ordinance and objecting to the injunction in the order of sale.

For the three reasons outlined, the court below was more than justified in dismissing their appeals.

II.

THE SHORT RECORD BEFORE THE CIRCUIT COURT OF APPEALS SHOWED THE ORDER APPEALED FROM, THE CAPACITY IN WHICH PETITIONERS APPEALED, AND THE NATURE OF THEIR CLAIMS. THOSE MATTERS, TOGETHER WITH THAT COURT'S JUDICIAL KNOWLEDGE OF ITS DECISIONS ON PRIOR APPEALS IN THE SAME CAUSE, CONSTITUTED A SUFFICIENT RECORD ON WHICH TO ACT.

The record certified to the Circuit Court of Appeals contained every item the court needed to pass on the motion to dismiss. This was an exact compliance with Federal Rule 75 (j) which provides in part as follows:

> "(j) Record for Preliminary Hearing in Appellate Court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, * * * the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose."

It has been shown above that the appeals were from non-appealable orders; that petitioners had no equity in the debtors and that the issues raised had been decided against them on prior appeals. Those were the grounds urged for dismissal in the court below and the record certified to that court contained every document necessary to show the existence of each of those incontestable grounds.

The short record contained, among other documents, copies of the petitions to modify and the orders of the

District Court denying the petitions. These documents showed the nature of petitioners' claims under the 1907 ordinance, the fact that they were appealing in their capacity as B Bondholders of Chicago Railways Company, the manner in which they wished to modify the order of sale and the nature of the District Court's order denying the modification.

Taking those documents, together with their knowledge of their own decisions on the former appeals, the judges, two of whom had heard both former appeals, had everything they needed in the way of a record on which to determine the motion to dismiss. It is fundamental that an Appellate Court may take judicial notice of its records on prior appeals between the same parties in the same cause.

Freshman v. *Atkins,* 269 U.S. 121.
McLeod v. *Boone* (CCA 9 1937) 91 F (2d) 71, 72.
Speers Sand & Clay Works v. *Pratt* (CCA 4 1930) 37 F (2d) 571.

Thus, from the record and through judicial knowledge the court had before it the fact that petitioners were seeking to modify an order of sale which had been entered a half year earlier; that the District Court had denied that application, and that the exercise of its discretion by the District Court in that respect was a non-appealable order. That alone was sufficient ground for dismissing the appeals and no additional parts of the record could possibly have avoided that unanswerable reason for dismissal.

The court further knew that it had formerly held petitioners had no equity in the debtor; and that it had decided petitioners' contentions under the 1907 ordinance adversely to them and that petitioners failed to obtain certiorari from this court. Finally, it knew that petitioners had appealed from the order of sale, attacking the injunctive provisions

on the ground that they were thereby prevented from asserting their so-called ordinance rights; that the appeal had been dismissed and no certiorari had been attempted.

Petitioners have protested that the certified record in the court below did not contain their statement of errors required by Rule 9, Title I of the Rules of the Circuit Court of Appeals for the Seventh Circuit. Even assuming that the court could not waive its own rule, such a statement of errors was dispensed with under the specific authority of Federal Rule 75 (j). No error could have been alleged which would have made the non-appealable orders appealable, or given petitioners an equity in the plan properties, or altered the fact that their contentions had been decided against them on prior appeals. Their statement of errors was obviously unnecessary to a decision of the issues raised by the motion to dismiss.

The case (*Lynch* v. *Durfey*, 108 F (2d) 181) which petitioners cite as being in conflict with the instant case on the question of an adequate record is far wide of the mark. There no record at all was certified to the Court of Appeals for the Ninth Circuit and that court was not even able to determine whether appeals had been taken!

Clearly there is no conflicting decision on this point and Federal Rule 75 (j) expressly provides for just such a record in just such a situation as was presented in the court below.

III.

PETITIONERS' APPEAL WAS FILED THE AFTERNOON BEFORE THE DAY SET FOR CONSUMMATION OF THE PLAN. SINCE THE APPEALS WERE GROUNDLESS YET LIKELY TO UPSET OR AT LEAST INDEFINITELY POSTPONE CONSUMMATION, THE COURT BELOW WAS JUSTIFIED IN DISMISSING THEM WITHIN TWENTY-FOUR HOURS.

From the emergency motion to dismiss, the court below knew that petitioners' applications to modify the order of sale were filed in the District Court shortly after subscriptions for the purchase of the entire issue of its bonds had been obtained by the Transit Authority; it was also advised that the bond sale might be defeated by the pendency of these appeals. It also knew that the appeals were filed in the afternoon of September 29, 1947 and that consummation of the plan was scheduled to take place in the District Court on the following morning.

Petitioners make violent objection to the speedy action of the Circuit Court of Appeals. It is submitted that the matters presented under points I and II, above, show clearly why that court was fully justified in proceeding summarily. Petitioners claim that they had no time to present their case adequately. The record reveals that they have presented their case again and again for over two years.

Was it only coincidental that they waited until the day before consummation to file their notices of appeal?

If they were serious in their objection to the injunction in the order of sale, they could have petitioned for cer-

tiorari last spring to review the dismissal of their appeal attacking the same injunctive provisions in the order of sale.

If they actually believed they still had rights, they could have appealed to the District court's discretion much earlier instead of waiting until September 3rd. And they could have filed these appeals shortly after the order of September 12th, instead of waiting until the afternoon before the day set for closing.

The answer, of course, is that they were primarily concerned with blocking the plan. No other conclusion can be reached after considering the tactics they adopted.

Petitioners are in a poor position to claim that their rights under the Fifth Amendment have been violated. That they have had due process of law in full and abundant measure is evident when it is remembered that the 1907 ordinance argument had previously been presented three times in the District Court, twice in the Court of Appeals and once in this Court.

All of that *due process* had preceded the hearing of September 30. Now, after three months, they present nothing in this petition for certiorari that they did not argue before the Circuit Court of Appeals on that day. While they, like respondents, were obliged to move expeditiously, they had full opportunity to and did present their position.

Perhaps few situations have occurred in which a claimant has more often and more persistently pursued a single given theory than have petitioners as shown by this record.

Due process of law does not depend upon the length of time given to argue, particularly when the litigant's position has been fully presented and when the same claim has

repeatedly been passed on by the courts in prior procedures in the same case.

Some mention is made that the emergency motion to docket and dismiss, filed September 29, 1947, was not verified. Many of the facts were known to the Circuit Court of Appeals and appeared from its own records. The representations of fact made in that motion were above the signatures of six sets of attorneys duly admitted to practice in that court. The verified answer which petitioners filed on September 30 did not controvert a single representation of fact that had been made in the emergency motion. Those facts are not now controverted by petitioners.

The prompt action of the Circuit Court of Appeals was not intended to and did not deprive petitioners of a full opportunity to present and argue their position; prompt action was necessary because it was becoming apparent that petitioners were trying to prostitute the appellate processes of the federal courts in an effort to gain by delay that which they had previously been unable to gain on the merits of their case.

IV.

PETITIONERS' REASONS FOR CERTIORARI ARE BASED ON A MISCONSTRUCTION OF THEIR OWN AUTHORITIES AND ON A COMPLETE MISCONCEPTION OF THE REORGANIZATION PROCEEDINGS INVOLVED.

Petitioners have alleged certain purported reasons for certiorari, hoping to come within Supreme Court Rule 38 which sets forth a guide to the "special and important reasons" which call for the exercise of this Court's discretionary power of review. We shall examine each of these

alleged reasons and show that the authorities cited to support them are inapplicable, that the facts of the reorganization proceedings involved have been distorted by petitioners and that in many cases the authorities cited by them to support their "reasons" had been urged by them without success on prior appeals in support of the same claims.

They first claim that the court below has departed from the usual course of judicial proceedings and deprived them of due process of law. This contention is answered in greater detail under Points I, II and III, showing that the record was adequate, was specifically provided for by Federal Rule 75 (j), and showed without possibility of contradiction that the appeals were entirely groundless.

In urging the above contention petitioners seem to believe that a motion to dismiss is a proper method of attack only when it is shown that the "legal requirements of an appeal" have been not complied with (Pet. Br. p. 4). That suggestion is not supported by any authorities and is contrary to the result in *Old Colony Trust Company* v. *Kurm*, 138 F. (2d) 394; *Orton* v. *Group of Investors*, 155 F. (2d) 489 (Cert. Den. 329 U.S. 489, 734); and in *Brown* v. *Thompson*, 150 F. (2d) 171, where non-appealable orders, similar to the orders here, were dismissed upon motion. Rule 75 (j) itself specifically contemplates a motion to dismiss on a short record.

They next contend that the court below decided an important question of federal law that has not been but should be settled by this court. This "important question of federal law" turns out to be an issue as to whether petitioners were denied an opportunity to be heard in the court below (Pet. Br. p. 6). They were given the opportunity in the instant appeal to present their arguments which, in view of the repeated prior hearings on the question, their lack

of equity in the properties and the manifest non-appealability of the orders sought to be reviewed, was the most they could ask. The short time in which petitioners were given to prepare their arguments was far from unusual, considering their dilatory tactics.

Their contention that the decision of the court below is in conflict with the decisions of that and other Circuit Courts of Appeals is based on three cases, which are in no way applicable.

> *In re Diversey Building Corp.* 86 F (2d) 456 (Pet. Br. p. 38) was cited by petitioners in their petition before this court in April, 1947 (p. 51). Aside from the fact that petitioners have been overruled on this contention on prior appeals, the case is not in point. It was there held that a bankruptcy court could not modify obligations of a guarantor who was not in bankruptcy. Petitioners try to apply this case by making the fantastic assumption that the City of Chicago (which in the first place obviously would have no power to do so) guaranteed the B Bondholders that they would get their money back in full even if the companies became insolvent. Nowhere in Section 23 of the ordinance is there a mention of such a guarantee. Any "right" if it still existed, was an asset of the debtor; and was so held by the Circuit Court of Appeals. The plan necessarily dealt with this alleged "right" as with other property of the debtor: otherwise a reorganization would have been perpetually impossible.
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> *In re 9 North Church Street, Inc.*, 82 F. (2d) 186 (Pet. Br. p. 40), is like the *Diversey* case (86 F 2d 456) and for the same reason, not in point.
>
> *Lynch* v. *Durfey,* 108 F. (2d) 181 (Pet. Br. p. 8), is cited as being in conflict on the question of the adequacy of the record and is specifically answered under Point II above.

In pretending that the decision below is in conflict with decisions of this court petitioners cite *American Federation*

of Labor v. *Watson,* 327 U.S. 582, *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, and *Thompson* v. *Magnolia Petroleum Co.,* 309 U.S. 478.

This contention completely misconstrues the Circuit Court of Appeals' holding affirming the approval and confirmation of the plan (160 F 2d 59, 66). That court did not hold invalid any state statute or city ordinance. It assumed the validity of the 1907 ordinance (for the purpose of the discussion) but held that such a contingent "right" to the ordinance purchase price, if any existed, was the property of the debtor and could be dealt with in the reorganization proceedings. Thus, even assuming that decisions of this court require that all laws must be construed by the state courts before the federal courts pass on them, the cases cited are inapplicable because the decision here involved was not a matter of state law but of federal bankruptcy law.

We do not believe, however, that this court would apply the *Magnolia Petroleum* case (309 U.S. 478) to the facts here involved if a decision on the validity of the ordinance had been required. In the *Magnolia* case a question of fee simple ownership under the law of Illinois was involved, in a matter concerned with the business of operating the debtor railroad and a decision thereon was not necessary to the carrying out of a reorganization plan. Here, however, a decision of some kind, either holding the 1907 ordinance not to be a bar to reorganization (which was done) or invalid as tying the hands of the bankruptcy court forever, was absolutely essential before going forward with the plan since the ordinance under its bizarre value formula would call for a purchase price of $172,000,000 (of which Chicago Railways' share would be some $101,000,000) while the plan provided for the purchase price of $75,000,000

(of which that debtor's share was $44,475,000). And petitioners, who now deny the necessity of such a holding, specifically urged otherwise on their appeals from the orders of approval and confirmation of the plan.

The *Erie* case (309 U.S. 64) is not in point because, as shown above, it was unnecessary, in upholding and carrying out the plan, to make any decision in conflict with local decisions. Again, this matter has been repeatedly argued in prior appeals.

Petitioners' fifth reason for certiorari purportedly coming under Rule 38 is that the decision below is in conflict with applicable local decisions. With one exception the so-called "applicable decisions" were fully urged by petitioners on prior appeals. The one exception is *Carson, Pirie, Scott & Co.* v. *Parrett,* 346 Ill. 252, by which they seek to apply the contracts doctrine of third party beneficiaries to the B Bondholders whose rights, if any, under the 1907 ordinance, are at most such remote interests as every bondholder might have in contracts in which his corporation is the promisee.

The *Parrett* case and the law of third party contracts obviously do not apply to the 1907 ordinance. It is fundamental to such a contract that performance move directly to the third party beneficiary. In other words the promisor promises the promisee to render performance not to the promisee but to some third person.

2 *Williston on Contracts* (Rev. Ed. 1936) Sec. 347.

Thus in the *Parrett* case (346 Ill. 252) promoters of a corporation promised the bond underwriters that they would pay the corporation's indebtedness for linens furnished by Carson, Pirie, Scott & Co. Thus performance (payment) moved directly to a named third person.

But in the 1907 ordinance the performance, if any, under Section 23, moved only to the promisee—Chicago Railways Co. Nowhere is there even a hint that any performance of any kind was to be rendered by the City of Chicago to the B Bondholders. Where a claimant is neither a promisee nor a person to whom performance is to be rendered, he is a mere incidental beneficiary and has no rights under the contract.

2 *Williston on Contracts* (Rev. Ed. 1936) Sec. 402.

Petitioners presented no acceptable reasons for certiorari in their April 1947 petition, which was denied, although at that time they still had a right to argue the issues. Now they are seeking the same result they sought then—a $172,000,000 purchase price—but their equity in the debtor is gone, their contentions stand overruled, and they are asking review of a non-appealable order. Their cause is totally obliterated.

V.

THE CITY OF CHICAGO AND THE CHICAGO TRANSIT AUTHORITY SHOULD NOT BE HARASSED BY NUISANCE SUITS THAT RAISE PROPOSITIONS OF LAW THAT HAVE PREVIOUSLY BEEN FULLY ARGUED BY PETITIONERS AND DISPOSED OF BY PRIOR ADJUDICATIONS UPON WHICH THE AUTHORITY RELIED IN MAKING ITS PURCHASE.

From the statement of the case as well as from the representations made to this court by respondents in April, 1947 (*In re Chicago Railways Company, etc.*, Nos. 1200-1205), it is apparent that over a period of almost twenty years the District Court has sought in vain to bring about a reorganization of Chicago Surface Lines.

The people of the metropolitan area of Chicago have now acquired these transportation systems. In doing so they have relied upon prior adjudications of the District Court, of the Circuit Court of Appeals, and the necessary implications that follow from the denial by this court of a petition for certiorari. They have further relied upon the decision of the Circuit Court of Appeals in dismissing the prior appeals from the same order of sale, from which decision no certiorari was sought. They have paid 75 million dollars for the properties.

Had Chicago Transit Authority, representing the people, believed that it would have no protection by injunction against subsequent suits by eliminated bondholders which would seek to compel it to pay $100,000,000 more than the plan purchase price, the purchase would never have been made and the plan would never have been carried into effect. By the same reasoning the bond buying public would not have invested millions of dollars of new capital in an effort to put Chicago's transportation finally upon a firm foundation.

The petition here is an attack on the integrity of the federal judicial process. If the decisions of the Federal Courts disposing of issues thoroughly argued and prescribing the terms under which property may be acquired are not final and dependable, then the power to effect a reorganization and compel obedience to its terms has been dissipated.

The interests of the general public in the final solution of the difficult problem of local transportation in Chicago as well as the protection of the effectiveness of the federal judicial power demands the denial of this petition for certiorari.

CONCLUSION.

The properties of Chicago Surface Lines, as well as of the Rapid Transit elevated system, have been acquired by the people of the metropolitan area acting through Chicago Transit Authority.

The alleged rights of these bondholders under the ordinance of 1907 have thrice been fully considered and adjudicated by the Circuit Court of Appeals; first in its principal decision affirming the orders of approval and confirmation of the plan; again in petitioners' appeal from the order of sale and again on September 30, 1947.

Surely nothing remains to be litigated. The only purpose of suits now would be the harassment of this public body by those who would embarrass public operation in the hope that it might eventually fail.

The petitioners have had due process of law; they have had repeated hearings; they have repeatedly been defeated; and their technical situation in the present appeals is completely untenable.

We respectfully ask that the petition be denied.

Respectfully submitted,

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